

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of the Local Competition
Provisions in the Telecommunications Act
of 1996)CC Docket No. 96-98Interconnection Between Local Exchange
Carriers and Commercial Mobile Radio
Service Providers)

CC Docket No. 95-185

Calling Party Pays Service Option in the
Commercial Mobile Radio Services)

WT Docket No. 97-207

**OPPOSITION OF
MID-MISSOURI CELLULAR**

Mid-Missouri Cellular ("Mid-Missouri"), by its attorneys and pursuant to Section 1.115 of the Commission's rules,^{1/} hereby opposes the Application for Review^{2/} filed by SBC Communications Inc. ("SBC") with respect to the May 9, 2001 letter (the "May 9 Letter") issued jointly by the Wireless Telecommunications and Common Carrier Bureaus.^{3/} The May 9 Letter responded to the request (the "Request") of Sprint Spectrum L.P. d/b/a/ Sprint PCS ("Sprint PCS") for a ruling that Commercial Mobile Radio Service ("CMRS") providers are entitled to recover traffic-sensitive costs of transporting and terminating telecommunications traffic on their wireless

^{1/}47 C.F.R. §1.115.

^{2/}Application for Review of SBC Communications Inc. in the above-captioned proceeding, filed June 8, 2001 ("Application for Review").

^{3/}See Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau and Dorothy T. Attwood, Chief, Common Carrier Bureau, to Mr. Charles McKee, Senior Attorney, Sprint PCS, Re: Cost-Based Terminating Compensation for CMRS Providers CC Docket Nos. 95-185 and 96-68, and WT Docket No. 97-207, May 9, 2001

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networks in accordance with Section 252(d)(2) of the Telecommunications Act of 1996 (the “Act”), 47 U.S.C. § 252(d)(2). As shown below, SBC’s Application for Review should be summarily dismissed as procedurally deficient. If the Commission elects to consider the Application for Review informally, Mid-Missouri demonstrates below that the May 9 Letter must be upheld because it is consistent with and well-grounded in the Commission’s reciprocal compensation rules, policies and precedent. Accordingly, if not dismissed forthwith, the Application for Review should be denied on the merits.

I. SBC’s APPLICATION FOR REVIEW SHOULD BE DISMISSED FOR VIOLATING SECTION 1.115(a) OF THE COMMISSION’S RULES

Sprint PCS initiated the instant proceeding with the filing on February 2, 2000 of a letter and legal memorandum, subsequently supplemented by a white paper, requesting confirmation and clarification that CMRS providers were entitled to reciprocal compensation for all additional costs of switching or delivering to their customers local calls originating on other carriers’ networks. In response, the Commission issued a Public Notice, DA 00-1050, released May 11, 2000, seeking public comment on the Sprint PCS submissions. The May 9 Letter was decided on the basis of the positions asserted by Sprint PCS and the initial and reply comments filed in response thereto.

As indicated in the May 9 Letter (at 2, note 8), and as Mid-Missouri confirmed with Commission staff, SBC filed neither initial nor reply comments in response to the Public Notice. Section 1.115(a) therefore imposed on SBC an unambiguous obligation to include with its Application for Review “a statement showing good reason why it was not possible for [SBC] to participate in the earlier stages of the proceeding.” No such statement appears in SBC’s Application for Review.

In identical circumstances, where a party filing an application for review omitted the “good reason” statement required by Section 1.115(a), the Commission immediately dismissed the filing as procedurally deficient.^{4/} The Commission has consistently endorsed the view that no party may be allowed “to lean back and await the outcome of a decision, and then, if it is unfavorable to its cause, to come forward seeking to present new evidence.”^{5/} Yet this is precisely what SBC has done by filing an Application for Review devoid of a compelling justification for SBC’s absence at the initial and reply comment stages of this proceeding. Nor can SBC’s omission be characterized as harmless error because other early stage participants filed applications for review raising substantive issues mirroring those briefed by SBC.^{6/} Here, just the opposite is true; SBC’s ideological allies—USTA, AT&T, BellSouth and U S West (now Qwest)--- have launched no challenge to the May 9 Letter.

That SBC violated Section 1.115(a) of the Rules is indisputable. Accordingly, the Application for Review is entitled to no substantive consideration and should be summarily dismissed. If, however, it elects to consider the merits of the Application For Review informally, the Commission must conclude that the May 9 Letter was correctly decided and must be upheld.

^{4/}*Arundel Trunked Partnership*, 19 CR 1190, 15 FCC Rcd 5288 (¶ 7) (2000); *Application of Family Stations, Inc.*, 12 FCC Rcd 11779, 11780-81 (1997).

^{5/}*American Telephone & Telegraph Co.*, 46 FCC 2d 878 (¶ 6) (1974); see *Concorde Telephone Exchange, Inc.*, 56 Rad. Reg. 2d (P&F) 653, 656-57 (¶ 9) (1984); *Charlotte L. Olive*, 68 Rad. Reg. 2d (P&F) 489, 5 FCC Rcd 5631 (Mob. Svcs. Div. 1990), *sub. hist. omitted*.

^{6/}*Request for Waiver of Section 24.711(b)(3) of the Commission’s Rules*, 14 FCC Rcd 9298 (¶ 5) (1999).

II. SBC'S DISPUTE WITH THE MAY 9 LETTER'S "ADDITIONAL COSTS" ANALYSIS IS AN UNTIMELY CHALLENGE TO THE LOCAL COMPETITION ORDER

The first section of SBC's Application for Review (at 3-6) is premised on the notion that the May 9 Letter may have impermissibly established a new "additional cost" standard that would apply uniquely to CMRS carriers. SBC focuses on the cross reference in the May 9 Letter (at 2-3) to the Intercarrier Compensation NPRM,²⁷ which states at paragraph 104 that wireless carriers who demonstrate that spectrum, cell site, backhaul link, base station controller and mobile switching center costs are correlated "to some degree" with increasing call traffic can submit a cost study to justify a claim for additional traffic sensitive costs associated with these network elements. SBC asserts that this NPRM provision, which it subtly derides as *dicta*, may be interpreted as affording CMRS providers a greater right to reciprocal compensation than wireline carriers, an outcome SBC characterizes as arbitrary, grossly discriminatory and contrary to public policy.

At bottom, SBC's fundamental dispute is not with the Sprint Request, the May 9 Letter or the Intercarrier Compensation NPRM, but with paragraph 1057 of the Local Competition Order, which plainly states:

[The Commission] finds that, once a call has been delivered to the incumbent LEC end office serving the called party, the "additional cost" to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching. The network elements involved with the termination of traffic include the end-office switch and local loop. The costs of local loops and line ports associated with local switches *do not* vary in proportion to the number of calls terminated over these facilities (footnote omitted). We conclude that such *non-traffic*

²⁷In the Matter of Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. Apr. 27, 2001) (hereinafter "Intercarrier Compensation NPRM").

sensitive costs should not be considered “additional costs” when a LEC terminates a call that originated on the network of a competing carrier.^{8/}

To the best of Mid-Missouri’s knowledge, neither SBC nor any other incumbent LEC ever challenged this aspect of the Local Competition Order. Only with the filing of the Sprint PCS Request and issuance of the May 9 Letter has the implication of paragraph 1057 dawned on the LEC community. Now SBC wants the Commission to believe that the paragraph 1057 finding that local loop costs do not vary with traffic volume is “demonstrably untrue.” SBC , however, has waited too long to bring this alleged untruth to the Commission, and fails to identify any evidence in the record of the Local Competition Order to validate its claim. Thus, in its Application for Review, SBC seeks nothing less than an egregiously belated reconsideration and revision of the Local Competition Order, something it has no right to do.

Nor does the May 9 Letter impermissibly “alter” the Local Competition Order, as SBC alleges in its Application for Review (at 4 - 5), by establishing an “additional cost” standard that applies exclusively to CMRS carriers. The Commission held in the Local Competition Order that, notwithstanding the presumption of symmetrical reciprocal compensation rates, a CMRS or local exchange carrier retains the right to submit a cost study justifying departure from the symmetrical compensation scheme.^{9/} Sprint PCS availed itself of this right, as the May 9 Letter acknowledges.^{10/}

^{8/}Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16024-25 (1996) (“Local Competition Order”); *see also* 11 FCC Rcd at 15893 (¶ 789).

^{9/}*See* Local Competition Order at ¶ 1089.

^{10/}Similarly, the applicability of tandem switching rate elements for CMRS and other interconnectors where their switches serve a geographic area comparable to that served by LEC
(continued...)

In summary, the conclusions set forth in the May 9 Letter are well-grounded in prior Commission's findings in the Local Competition Order and in the Intercarrier Compensation NPRM, and by the detailed costing analysis found in the White Paper associated with the Sprint Request. SBC's Application for Review, by contrast, is a belated and unsupported attempt to rewrite the Local Competition Order for the purpose of justifying an assault on the May 9 Letter. Therefore, the May 9 Letter's conclusions regarding the scope of CRMS carriers' "additional costs" should be upheld.

III THE MAY 9 LETTER'S TANDEM INTERCONNECTION RATE FINDINGS ARE WELL-REASONED AND CONSISTENT WITH PRECEDENT

SBC also asserts that "the [May 9 Letter] could be interpreted in a manner that conflicts with the Commission's rules for determining when a CMRS provider or CLEC is entitled to the tandem interconnection rate."^{11/} As the Bureaus point out in the May 9 Letter (at 3), the Commission has recently reiterated its findings on this issue in the Intercarrier Compensation NPRM. Section 51.711(a)(3) "requires only that the comparable geographic area test be met before a carrier is entitled to the tandem interconnection rate for local call termination," notwithstanding additional language in the Local Competition Order regarding functional equivalency.^{12/} Therefore, "a carrier demonstrating that its switch serves 'a geographic area comparable to that served by the incumbent LEC's tandem switch' is entitled to the tandem interconnection rate to terminate local

^{10/}(...continued)
tandem, was addressed *See id.* at ¶ 1090.

^{11/}Application for Review at 6.

^{12/}May 9 Letter, *citing* Intercarrier Compensation NPRM at para. 105.

telecommunications traffic on its network.”^{13/}

IV. THE MAY 9 LETTER IS PROCEDURALLY PROPER

SBC claims that the May 9 Letter is procedurally improper, asserting that it fails to acknowledge or respond to the comments that were filed in opposition to the Sprint PCS Request.^{14/} SBC argues that the Bureaus must “demonstrate the rationality” of their decisionmaking process by responding to those comments that are “relevant and significant”^{15/} and by considering all important aspects of the problem.^{16/} Specifically, SBC highlights contentions raised by USTA, AT&T, BellSouth and Qwest, which the May 9 Letter either failed to acknowledge or answer. None of these commenting parties sought reconsideration or review of the May 9 Letter, thus casting doubt on SBC’s assessment of the May 9 Letter or the relevance and significance of these overlooked filings.

In addition, SBC nowhere acknowledges longstanding exceptions to the generally-stated rules of administrative decisionmaking to which it cites. The May 9 Letter was lawfully issued as an informal statement of rules already promulgated by the Commission in the Local Competition Order. The Bureaus went above and beyond the minimal requirements for justifying a letter explaining existing Commission rules and policy.^{17/} A failure to provide detailed responses to comments on the record, where the Due Process Clause itself does not require them (which has not been asserted here)

^{13/}*Id.*

^{14/}Application for Review at 10-11.

^{15/}*Id.* at 11, citing *Grand Canyon Air Tour Coalition v. FCC*, 154 F.3d 455, 468 (D.C. Cir. 1998).

^{16/}*Id.*, citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

^{17/}*Pension Benefit Guaranty Corporation, Petitioner v. LTV Corporation et al.*, 469 U.S. 633 (1990).

is therefore not unlawful.^{18/}

Moreover, even where a more formal decision is required, the Courts will “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”^{19/} Certainly, the May 9 Letter provides a clear path to its interpretation from the Local Competition Order and Section 51.711(a)(3), as well as the Intercarrier Compensation NPRM, which proposes no changes to Section 51.711(a)(3). Consequently, Mid-Missouri urges the Commission to uphold the May 9 Letter’s clarification of existing Commission rules, because such clarification is directly consistent with and well-grounded in existing Commission decisional precedent and policies.

^{18/}Similarly, in the rulemaking context, an agency need only provide a statement of sufficient detail to “allow a searching judicial scrutiny” of how and why regulations were actually adopted, but need not expressly discuss each comment filed in response to a rulemaking notice. *Bedford County Memorial Hospital v. Heckler*, 583 F. Supp. 367, 374 (W.D. Va. 1984).

^{19/}*Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 US 281 (1974).

V. CONCLUSION

For all the foregoing reasons, Mid-Missouri respectfully requests that the Commission summarily dismiss SBC's Application for Review as procedurally defective. If it elects to consider the Application for Review's substantive contentions informally, the Commission should conclude that the May 9 Letter was correctly decided and should be upheld.

Respectfully submitted,

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June 25, 2001

CERTIFICATE OF SERVICE

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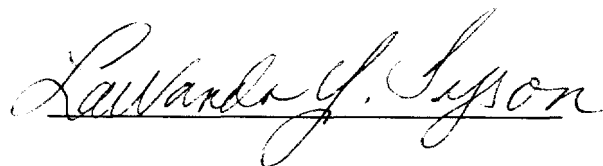
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*Sent via First Class United States Mail, postage prepaid